

IN THE  
United States  
**Court of Appeals**  
For the Ninth Circuit

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UNITED MERCURY MINES COMPANY,  
*Appellant,*

vs.

BRADLEY MINING COMPANY,  
*Appellee.*

---

**BRIEF OF APPELLANT**

---

*Appeal from the United States District Court  
for the District of Idaho, Southern Division*

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PAUL S. BOYD,  
P. O. Box 2084, Boise, Idaho  
E. H. CASTERLIN,  
P. O. Box 1384, Pocatello, Idaho  
DALE CLEMONS,  
Idaho Building, Boise, Idaho  
WILLIAM LANGER,  
Bismarck, N. Dakota,  
and Washington, D. C.  
*Attorneys for Appellant.*

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WILLIAM LANGER,  
Bismarck, N. Dakota,  
and Washington, D. C.  
*Attorneys for Appellant.*



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STATEMENT OF CASE

United Mercury Mines Company, hereafter called United, brought this action against Bradley Mining Company, hereafter called Bradley, alleging that by a written instrument dated December 31, 1941, United conveyed to Bradley the Meadow Creek and Hennessy groups of mining claims in Valley County, Idaho, and in consideration thereof Bradley agreed to pay United a royalty of five per cent on all net smelter returns, net revenue and net mint returns, as defined in said agreement, for all minerals, ores, metals or values (hereafter called values) taken from

said mining claims for a period of nine hundred ninety-nine years and thereafter (R 3-6); that in 1949 Bradley, at its own costs, constructed on the claims and has always owned the Yellow Pine smelter in which it has smelted concentrates produced from ores taken from said claims and has sold the saleable products therefrom to unknown purchasers for unknown sums of money (R 8); that Bradley is obligated to pay royalty on the saleable products from the smelter on the basis of net revenue as defined in the agreement, which it refuses to do (R 9); that Bradley contends it is only obligated to pay royalty on the concentrates smelted in the Yellow Pine smelter on the basis of net smelter returns as defined in the agreement (R 9), using a formula especially devised by it for that purpose (R 9); that the difference between the royalties based on the net revenue and those based on the net smelter returns exceeds \$10,000.00, which is owing United (R 10); that an actual controversy exists between the parties as to the provisions of the agreement applicable to the computation and payment of royalties and the nature and extent of the obligation of Bradley to furnish information to insure United that it is receiving the royalties to which it is entitled (R 10); and praying judgment interpreting the provisions of the agreement, decreeing that Bradley pay royalties on the saleable product from the smelter on the basis of net revenue, requiring Bradley to furnish the information requested by United, and requiring an accounting (R 11).

Bradley answered by admitting the agreement, the construction and ownership of the smelter, the

smelting therein of concentrates from ores taken from the claims, the sale of the saleable products from the smelter to purchasers, and the existence of the controversy; by denying its obligation to pay royalty on the basis of net revenue from the sale of products from the smelter, that any money is due United on account of royalties, and that it has refused to give the requested information; and alleging that the royalty to which United is entitled is to be computed on the basis of net smelter returns as defined in the agreement on the concentrates from ores taken from the claims before they are smelted and as a second affirmative defense that any other method of computation would be unjust, would result in taking property unlawfully, would unjustly enrich United and would be contrary to the terms of the agreement as interpreted by United (R 41-50).

After the issues were thus joined, United moved to strike the second affirmative defense (R 50); Bradley moved for judgment on the pleadings (R 51); and United moved to strike certain portions of the affidavits supporting the motion for summary judgment (R 71, 112).

On October 10, 1952, the court denied all of the motions and in its order stated, "I will not set a definite date for trial of the case at this time in the hope that the parties may be able to adjust their differences. But it will be set for some early date if that contingency becomes necessary." (R 140).

On February 1, 1955, this cause came on for pre-trial pursuant to notice. (R 187).

At the pre-trial Bradley stated that the following issues remained to be determined:—(1) should royalty be computed on the basis of net smelter returns (R 198); (2) if so, shall the royalty be computed as Bradley has computed them in the past upon the value of the concentrates, relating those values to what might reasonably be expected from sales to independent smelters, or should they be computed on the returns from smelted products less normal smelter charges, and what are net smelting charges (R 198); (3) has Bradley fairly calculated and paid royalties upon the basis it has followed in the past (R 199); (4) if royalties are to be based on the alternate plan, what is the fair rate of depreciation and the fair return upon the investment to be charged and deducted (R 199); if they deny it (that Bradley has paid on the basis of net smelter returns) (R 206), then we are put to our proof and this has been denied by United (R 201).

At the pre-trial United stated the additional issues unresolved,—(1) do Bradley's books correctly show the amount of net smelter returns on all concentrates processed at the smelter used in its computation of royalty (R 200-201); (2) has Bradley computed net smelter returns on the same basis as independent smelters (R 201).

At the time of the pre-trial the record disclosed no issue of law then pending. The record discloses no trial on any issue of fact.

At the pre-trial conference, the court entered a judgment dated that day dismissing the complaint (R 189).

On February 21, 1955, United filed Notice of Appeal (R 191) and on the same day filed a Cost Bond (R 191).

## JURISDICTION

Jurisdiction of the District Court is based upon diversity of citizenship, United being a citizen of Idaho and Bradley being a citizen of California (R 3, 41) and the amount in controversy which exceeds, exclusive of interest and costs, the sum of \$3,000.00 (R 10). Title 28, Section 1332 United States Code.

This court has jurisdiction to review the case on appeal by reason of Title 28, Sections 1291 and 1294, United States Code and Rule 73 of the Federal Rules of Civil Procedure.

## STATEMENT OF FACTS

On December 31, 1941, United, as the first party, and Bradley, as the second party, entered into a written agreement a true copy of which is attached to the complaint as Exhibit 1 (R 141, 146), whereby United conveyed to Bradley the Meadow Creek and Hennessy groups of mining claims in Valley County, Idaho, (R 13) and

“For and in consideration of the premises and the conveyance and assignment of the above described properties, Bradley, for itself, its successors and assigns, does hereby covenant, promise and agree to pay to United, its successors and assigns, a royalty of five per cent (5%) on all net

smelter returns, net revenue, and net mint returns, as defined herein, upon and for all minerals, ores, metals or values, of any and every kind and character, mined, extracted or taken from the above described mining claims, or any part thereof, or from any lands, grounds or claims, lodes or deposits, within the exterior boundaries of said groups of claims; the payment of said five per cent (5% )royalty to begin with the first returns received on concentrates shipped from Cascade, Idaho, after Midnight, December 31, 1941, and to continue thereafter for nine hundred and ninety-nine (999) years and as long thereafter as minerals, ores or values shall be extracted, mined or taken from the above described property, at the times and in the manner hereinafter provided;" (R 15).

The agreement also provides :

"By net smelter returns, as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that the smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted.

By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho.

By net mint returns, as used herein, is meant the amount paid by any United States Mint, branch or agency thereof, less all shipping and marketing costs from Cascade, Idaho.

It is agreed that in addition to the deductions of railroad freight from Cascade, Idaho, to the smelter, market, or mint, that Bradley shall also be allowed to deduct from the net smelter, market, or mint returns Two Dollars and Fifty Cents (\$2.50) per ton for each ton of concentrates, ores, metals, or values hauled or shipped from the above-described property to Cascade, Idaho, the said sum to be deducted from the net smelter, market or mint returns before net royalty herein provided for is computed.

It is also agreed that in the event that concentrates or bullion are hauled or shipped by truck to a smelter, market, or mint beyond Cascade, Idaho, there shall be deducted from the net smelter, market, or mint returns the amount for trucking that it would have cost to ship the same by railroad from Cascade, Idaho, to the smelter, market, or mint to which the same are trucked.

Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works.

It is agreed that reference in this instrument to 'Cascade, Idaho,' shall be deemed to include Cas-

cade, McCall, or any nearby place from which shipment is made by rail.

The above covenants on the part of Bradley to pay the royalty herein agreed to be paid shall be considered and held to be covenants running with the lands, grounds, minerals, ores, values, and mining claims hereby conveyed to Bradley and shall be binding upon Bradley, its successors and assigns, forever." (R 17-18).

This agreement also provides that:

"It is agreed that Bradley shall furnish United all necessary information that United may require to assure it that it is receiving the royalty to which it is entitled hereunder, and that United shall have the right to inspect, examine and make copies of the books and records of Bradley and supporting data at least every six (6) months so as to enable United to satisfy itself that it is receiving its proper royalties." (R 16)

and that

"Except that in the event Bradley, its successors and assigns, fails or refuses to pay any royalties herein reserved when the same shall become due that the said United shall have a mortgage lien in, to, and upon all of the above and foregoing described properties to secure the payment of said sums and Bradley does hereby mortgage the above and foregoing described properties, and any interest it may hereafter acquire in the Midnight Group

hereinafter described, and the whole thereof, to secure the payment of said royalty." (R 19).

United has conveyed to Bradley all of the said mining claims (R 142, 146).

From December 1, 1941, to July 1949, Bradley extracted principally gold, silver, antimony and tungsten from the claims (R 146) and shipped the concentrates to smelters or reduction plants in which it had no interest and paid United royalties on the basis of net smelter returns (R 147).

During the year 1949, Bradley built the Yellow Pine smelter on the claims at its own costs. Bradley has owned the smelter at all times. (R 142, 146).

The Yellow Pine smelter went into operation in July 1949 (R 142, 146), and thereafter 45%—based on values—of the concentrates produced from the ore mined on the claims was shipped to outside smelters (those in which Bradley had no interest (R 147)) and royalty thereon was paid on the basis of net smelter returns as defined in the agreement (R 143, 147), and the remaining 55%—based on values—of the concentrates was smelted at the Yellow Pine smelter (R 144, 148).

Title to the concentrates shipped to the outside smelters passed from Bradley to them upon receipt of the smelter returns accompanied by the settlement reports exemplified by Exhibit 2 (R 143, 148; 29-31).

Title to the saleable products from the concentrates smelted at the Yellow Pine smelter remained in Bradley until the same were sold and paid for (R 144, 148).

Bradley has sold saleable products from the Yellow Pine smelter to purchasers thereof and has received therefor a gross of \$5,129,607.73 (R 172) from which is deductible marketing and shipping costs from Cascade, Idaho, as provided in the agreement (R 17).

Bradley has not paid United the royalty of 5% based on these gross receipts from the sales of the said saleable products from the Yellow Pine smelter, less the marketing and shipping costs from Cascade, Idaho (R 145, 149).

Bradley has paid United on account of the royalties due and owing from the operations of the Yellow Pine smelter various sums of money determined by computing the value of the concentrates on the ground at the mouth of the roaster and relating these values to what might reasonably be expected from a sale of the same to independent smelters (R 198). This method of computation involves no sale of the concentrates or the smelted products therefrom (R 144, 148).

### SPECIFICATIONS OF ERROR

- I. The District Court erred in dismissing the action.
- II. The District Court erred by not interpreting the contract in question in its final judgment, either as contended by the Plaintiff or as contended by the Defendant.
- III. The District Court erred by ruling, deciding and holding that the Plaintiff is not entitled to have an accounting from the Defendant based

upon the net revenue provision of the contract which merely disposes of the accounting feature and not the main issue of the interpretation of the contract.

- IV. The District Court erred in concluding that there is no genuine issue as to any material fact in this action.
- V. The District Court erred in concluding that there is no controversial question of fact to be submitted for trial by the Court.
- VI. The District Court erred in concluding that the defendant is entitled to judgment as a matter of law.
- VII. The District Court erred in drawing the foregoing conclusions and in entering the judgment herein without first making and entering findings of fact upon which said conclusions and said judgment is based.
- X. The District Court erred in holding and in entering its Memorandum Decision of October 10, 1952.
- XI. The District Court erred in holding and entering the Memorandum Decision of April 9, 1954.
- XII. The evidence is wholly insufficient in any of the foregoing conclusions to support the judgment entered herein.

## STATEMENT OF ISSUES

Is Bradley obligated to pay royalty in accordance with the express provisions of the agreement, and,

if so, which provision of the agreement is applicable to the operation of the Yellow Pine smelter?

Has Bradley paid royalties in compliance with the applicable provision of the agreement?

Is United entitled to an accounting?

## ARGUMENT

### I

Assignments of Error numbered I, II, IV, V and VII may be condensed in the following restatement and may be so discussed. It was error to enter a judgment of dismissal without interpreting the contract either as contended by United or as contended by Bradley after having entered findings of fact on the then pending genuine issues of fact.

After the pleadings were closed and after all issues of law had been disposed of the cause came on for pre-trial under Rule 16.

The judgment of dismissal could not have been entered then by the court under Rule 41 (b) because (1) the defendant made no motion for dismissal on any of the grounds therein contained, (2) the defendant made no motion after the plaintiff had completed the presentation of its evidence, as no opportunity was afforded to give evidence at any trial, (3) the court never tried any of the issues of fact then pending, (4) no findings of fact were made and entered as provided in Rule 52(a).

This judgment could not have been entered then under Rule 56 because the motion for summary

judgment had previously been denied and the same had not been renewed, and there were pending genuine issues of fact that had not been resolved.

At the pre-trial hearing the simplification of issues was a matter of discussion. Bradley then stated certain issues of fact that remained undetermined and United stated certain issues of fact in the same condition. These were genuine issues. There never was a trial of any of these issues of fact, the same were not submitted on an agreed statement of facts and there was no confession of judgment with respect to any of these issues.

When issues of fact remain undetermined, they must be determined

88 C.J.S. p. 21, note 53

89 C.J.S. p. 418, note 54

46 C.J. p. 1224, note 60

Clair et al v. Sears Roebuck & Co., 34 F. Supp. 559

Van Wormer v. Champion Paper & Fiber Co., 28 F. Supp. 813

Refractolite Corp. v. Prismo Holding Corp., 25 F. Supp. 965

by proof

Frank Adam Electric Co. v. Westinghouse Electric Mfg. Co., 146 F (2) 165

Donnelly Garment Co. v. National Labor Relation Board, 123 F (2) 215,224

presented by sworn testimony or by agreement of counsel

89 C.J.S. p. 373, note 36.

In the state of the record at the time of the pre-trial it was the duty of the court to set the issues for trial and thereafter to pass upon all of the issues raised by the pleadings and the evidence, and failure to do so is error.

89 C.J.S. p. 418

McCaffrey v. Elliott (CCA Fla)

47 F (2) 72.

Any decision on the issues of fact must be based on evidence admitted in the case

89 C.J.S. p. 417, note 46

and this evidence must be followed by findings of fact necessary to sustain the judgment

Rule 52(a).

The result is that there were genuine issues of fact, there was no trial, there were no findings of fact and there is no judgment interpreting the contract either as contended by United or as contended by Bradley.

It is axiomatic that contracts must be construed to give effect to all of its provisions as intended by the parties if it is possible so to do.

Wright v. Village of Wilder, 63 Idaho 122,  
117 P (2) 1002  
12 Am. Jur. p. 772  
17 C.J.S. p. 707

It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, and, in the absence of any ground for denying enforcement, to enforcing or giving effect to the contract as made, that is, to enforce or give effect to the contract as made without regard to its wisdom or folly, to the apparent unreasonableness of the terms, or to the effect that the rights of the parties are not carefully guarded, as the court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of the words contained in the contract. The court will not make a contract for the parties where they have not made a contract or where the alleged contract is not enforceable.

Sorensen v. Larue, 43 Ida. 292,  
252 P. 494  
Weed v. Idaho Copper Co., 51 Idaho 753,  
10 P (2) 613  
17 C.J.S. p. 702  
Nuquist v. Bauscher, 71 Idaho 89,  
227 P (2) 83  
12 Am. Jur. 749

The intention of the parties is to be deduced from the language employed by them, and the terms of the contract, where unambiguous, are conclusive, and the rule making the terms of the contract conclusive where unambiguous is controlling, in the absence of averment and proof of mistake, the question being not what intention may have existed in the minds of the parties but what intention is expressed by the language used.

Farm Credit Corp. v. Meierotto, 50 Idaho 538,  
298 P. 378

Ehlinger v. Washburn Wilson Seed Co., 51 Idaho 17, 1 P (2) 188  
1 P (2) 188  
17 C.J.S. p. 695

The contract in question falls entirely within the foregoing provisions and can be interpreted to give effect to all of its provisions without violating any of them.

The contract provides that Bradley shall pay "a royalty of five per cent (5%) on all net smelter returns, net revenue, and net mint returns, as defined herein, upon and for all minerals, ores, metals or values, of any and every kind and character, mined, extracted or taken from the said mining claims" (R 15), and further provides for royalty to be paid "on or before the 20th day of the calendar month next succeeding the *receipt* by Bradley of said net returns as defined herein, the same to be so paid each and every month when any net smelter, mint, or other re-

turns are *received* by Bradley, copies of all sales returns to be furnished United by Bradley" (emphasis supplied). It will be admitted that net mint returns are not here involved so that our discussion may be confined to net smelter returns and net revenue.

It is also apparent that the contract presumes a sale of minerals, ores, metals or values because it is expressly provided that the royalties are to be paid upon receipt of the money paid Bradley from the sales. It is also conceded that Bradley owns all of the said minerals, ores, metals or values until the same are sold or disposed of. It is impossible for Bradley as owner to sell to itself as purchaser any of the said values taken from the claims. Bradley has not paid royalties to United until it has received money from the sale of minerals, ores, metals or values. The lower court recognized in its memorandum decision of October 10, 1952, that Bradley does not sell any concentrates to itself and stated: "In the instances we are concerned with here Bradley does not sell any concentrates to the smelters nor does it sell any concentrates to itself". In the definition of net smelter returns as used herein is "meant the amount *received* (emphasis supplied) from the smelter from any and all concentrates, metals or values shipped to smelter

\*\*\*".

The express terms of this definition precludes Bradley from paying royalties on the concentrates at the Yellow Pine smelter on the basis which it contends is correct because there is no sale and no money received by Bradley from those concentrates or the saleable products they contain until the saleable prod-

ucts are sold. It would then appear that net smelter returns as defined in the contract is not applicable to the present situation as pointed out by the lower court in its memorandum decision of October 10, 1952.

The one question left would be whether or not net revenue as defined in the contract is applicable to the operation at the Yellow Pine smelter. An analysis of the definition of net revenue indicates that by net revenue is meant "the amount paid by *any purchaser* from the *sale* of concentrates, ores, *metals* or *values* shipped, taken or produced from said properties,\*\*\*" (emphasis supplied).

It will be conceded, we believe, that the end product from the smelting operation at the Yellow Pine smelter produces metals and values and that these metals and values are sold by Bradley to purchasers. It is apparent that the situation is covered in detail by the definition of net revenues as contained in the contract.

By reason of the foregoing, the lower court erred by dismissing the action without interpreting the contract in question and without interpreting the same as contended by United; by dismissing the action without a trial when genuine issues of fact were pending; by entering a judgment of dismissal without findings of fact, the judgment being one on the merits.

## II

Specification No. III is that the court erred by ruling, deciding and holding that the plaintiff is not

entitled to have an accounting from the defendant based upon the net revenue provision of the contract which merely disposes of the accounting feature and not the main issue of the interpretation of the contract.

By the prayer of its complaint United asked the court to "require an accounting by the defendant to the plaintiff and, upon such accounting being had, that plaintiff have judgment against the defendant for any amount found due, owing and unpaid \*\*\*\*" (R 12). In its judgment the lower court decided that the plaintiff was not entitled to have an accounting from the defendant based upon the net revenue provision of said contract but only, if at all, upon the net smelter returns provision of said contract. It is impossible to determine what the court meant by the expression "if at all." The fact remains that the court denied United the right to an accounting on either theory. Regardless of which theory prevailed United was entitled to an accounting and it was error to preclude United from having such an accounting in court under the state of the record.

It was error to deny United an accounting in this case.

### III

Specification No. VI is that the district court erred in concluding that the defendant is entitled to judgment as a matter of law.

It was error to so hold for the following reasons: There was no issue of law pending before the court on the date of its judgment. None of the pending genuine

issues had been determined and as long as the controversy remained unresolved neither the facts contended by United nor the facts contended by Bradley could be accepted as the final facts from which the court could conclude that the case should be dismissed as a matter of law. The law cannot act upon a state of facts until the same are resolved and established.

#### IV

Specification No. X is, "The district court erred in holding and in entering its memorandum decision of October 10, 1952" (R 136). The only matters before the court at that time were the motion of United to strike the affirmative defense (R 50); the motion of Bradley for judgment on the pleadings (R 51); and the motion of United to strike certain portions of the affidavits supporting the motion for summary judgment (R 71, 112). The court acted upon these motions and denied all of the same (R 140). The court's decision should have ended with the denial of these motions and should have gone no further as nothing else was then pending before the court. Further proceedings were necessary in order that the court could determine if the net revenue provision or the net smelter returns provision should form the basis of computing royalties and these further proceedings should have been as contended above with respect to trial, proof and findings.

Notwithstanding, the court by this memorandum decision has attempted to set aside the agreement in toto and substitute therefor a new agreement that

Bradley is entitled to pay royalties on a quantum meruit basis without the necessity of an accounting. The lower court expressly stated in this decision that: "It would seem that if the court must determine the matter it would have to be on the principle analogous to quantum meruit for the court obviously cannot make a contract for the parties." (R 139). By making this statement the court attempted to set aside the agreement between the parties and substitute therefor a new agreement while stating that it had no authority to so do.

It was error for the court to do more in its decision of October 10, 1952, than to act upon the motions then pending before it.

## V

Specification of Error No. XI is that the district court erred in holding and entering the memorandum decision of April 9, 1954 (R 164).

When this memorandum decision was issued there was nothing before the court except objections to certain interrogatories directed to Bradley Company and a motion on its part for a protective order limiting the scope of an inspection of records desired by the plaintiff (R 164). In passing upon the objections and the motion the court said: "I think, therefore, that the information sought by United may have been material, and the objections to the interrogatories and the request for inspection are accordingly disallowed." (R 166). This decision completely disposed of the matters then before the court and the court

erred respecting the other matters contained in said decision.

## VI

Specification No. XII is that the evidence is wholly insufficient to support the conclusions or the judgment entered herein. As to this specification, the court by its judgment of dismissal assumed that the facts, established by proof, did not warrant the plaintiff in having an interpretation of the contract; did not entitle the plaintiff to a decree that the proper and legal method of determining the amount of royalty was by the use of net revenue as defined in the contract; that the plaintiff was entitled to an accounting on any theory. As a matter of fact there was no evidence of any kind and consequently the conclusions and judgment of the court are not sustained by any evidence whatever.

## CONCLUSION

The trial court erred in dismissing the action while genuine issues of fact remained unresolved.

The trial court erred in denying United an accounting under the net revenue provisions of the contract and further erred in denying United an accounting under any provision of the contract.

The trial court erred in failing to interpret the contract and has attempted to impose a new and different agreement upon the parties, notwithstanding that the net revenue provision of the contract completely covers the controversy between the parties

without doing violence to any other provision of the contract.

Respectfully submitted,

PAUL S. BOYD,  
Boise, Idaho,

E. H. CASTERLIN,  
Pocatello, Idaho,

DALE CLEMONS,  
Boise, Idaho,

WILLIAM LANGER,  
Bismarck, N. Dakota,  
and Washington, D. C.,  
*Attorneys for Appellant.*